(21)

No. 95-1340

In The
Supreme Court of the United States
October Term, 1996

Hughes Aircraft Company,
Petitioner,

v.

United States ex rel. William J. Schumer,
Respondent.

CORRECTED COPY

On a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

A. District Court Proceedings

1. On January 20, 1989, William J. Schumer, the respondent in this Court, commenced this action against Hughes Aircraft Company ("Hughes"), the petitioner herein. The suit was brought pursuant to 31 U.S.C. § 3730 (b), the provision of the False Claims Act ("FCA" or "Act") that authorizes a private individual to bring claims on behalf of the United States against persons alleged to have submitted false or fraudulent claims to the United States.

Schumer's complaint alleged that, as the subcontractor on a number of defense contracts between the United States and various prime contractors (i) Hughes knowingly mischarged costs to those prime contractors—and ultimately to the Government—by allocating costs among its various contracts through the use of an internal "Commonality Agreement" (an arrangement reached among Hughes' own managers) which called for cost allocations different from those required by the terms of Hughes' contracts, J.A. 72-73; and (ii) Hughes "ordered said Commonality Agreement [to be] . . . suppressed or concealed from the customers of Hughes including the United States Government," J.A. 72.

Schumer alleged in particular that, as a result of this mischarging and concealment, certain radar development costs that should have been allocated to a fixed-price contract with the McDonnell-Douglas Corporation to improve the F-15 fighter were instead allocated and charged to a "cost-plus" contract with the Northrop Corporation to provide a radar system for the B-2 bomber. J.A. 72.[1] Because both the subcontract between Hughes and Northrop and the prime contract between Northrop and the United States

[1] The B-2 program is referred to in the complaint by the code name "2301 Special Program," because the program was classified at the time. *See* J.A. 73.

were "cost-plus" contracts, Pet. App. 42a, J.A. 29, every dollar charged by Hughes to Northrop ultimately was to be reimbursed to Northrop by the Government.[2]

2. When an FCA *qui tam* action such as this is commenced, the United States has the option to (i) intervene and assume "primary responsibility for prosecuting the action;" (ii) "dismiss the action" after affording the relator notice and an opportunity to be heard; or (iii) do neither "in which case the person bringing the action shall have the right to conduct the action." 31 U.S.C. §§ 3730 (b)(2), (b)(4), (c)(2)(A). In the instant case, the Government chose the last of these options by entering its notice of election not to intervene on May 30, 1990. J.A. 104.

3. On September 7, 1990, Hughes moved under Federal Rule of Civil Procedure 56(b) to dismiss Schumer's action as jurisdictionally barred. *See* Docket No. 29 at 2.[3]

Hughes contended first that the applicable provision governing jurisdiction over *qui tam* actions was the one in effect prior to 1986, when Hughes engaged in its allegedly wrongful conduct. *See* 31 U.S.C. § 3730(b)(4) (superseded). Under that provision if, at the time of the relator's suit, the Government *possessed* the information on which the relator's suit was based, the suit was barred.

Hughes argued in the alternative that the suit was barred in any event because it was "based upon the public disclosure of allegations . . . in a[n] . . . administrative . . . audit," within the meaning of 31 U.S.C. § 3730(e)(4) (A) (quoted in full *infra* at 20), which was enacted in

[2] On April 3, 1990, Schumer filed a First Amended Complaint. That complaint alleged that Hughes' managers had entered into other allegedly improper internal "Commonality Agreements" respecting the allocation of costs to Government contracts, J.A. 90, and, again, the complaint alleged that Hughes ordered the Commonality Agreements "suppressed or concealed from . . . the customers of Hughes and the Department of Defense, including specifically the United States Air Force and Navy Project Offices." *Id.*

[3] Docket references herein are to the district court docket.

1986 as part of the False Claims Amendments Act (hereinafter "1986 Amendments").

Hughes relied on two documents to establish that prior to the filing of Schumer's complaint, the United States both had possessed, and had made public disclosure of, the information on which Schumer's suit was based: first, an Air Force audit report which, when suit was filed, was classified as "SECRET," J.A. 29, 117; and second, an unclassified, redacted version of a one-page classified Defense Contract Audit Agency ("DCAA") document called a "DCAA Form 1," J.A. 43-44. Both documents were disclosed only to Hughes and to Northrop, the prime contractor on the B-2 program, and to no one else. J.A. 114. And, Hughes submitted no evidence that Schumer had even seen, let alone derived his information, from either of those documents.

On November 1, 1990, the district court summarily denied Hughes' motion. Pet. App. 34a.

4. On January 27, 1992, Hughes renewed its motion to dismiss for lack of jurisdiction. In this second motion, expressly brought pursuant to Fed. R. Civ. P. 12(b)(1), Hughes stated that its motion was *not* predicated on the release of any classified audit reports such as the Air Force report, but instead on three subsequent unclassified DCAA audit reports and on the redacted "Form 1" described above. J.A. 177. The DCAA audit reports, though unclassified, were disclosed only to Hughes and not to Northrop or to anyone else. J.A. 172-73.

Each of the three DCAA audit reports that Hughes contended was "publicly disclosed" contained a cover sheet bearing the following statement:

> Contractor information contained in this audit report may be confidential. The restrictions of 18 U.S.C. 1905 [a criminal provision prohibiting Government employees from making unauthorized disclosures of information obtained in the course of their employ-

ment] should be considered before this information is released to the public.

This report may not be released to any Federal agency outside the Department of Defense without the approval of Headquarters, DCAA, except to an agency requesting the report in negotiating or administering its contract. [J.A. 33, 39, 59.]

And, on each page of each report, the following legend appeared in capital letters: "FOR OFFICIAL USE ONLY." *See* J.A. 33-42.[4] Although the DCAA audit reports and the related Form 1 were not classified, Hughes had, prior to the time of its motion, claimed that those documents were confidential, proprietary documents.[5]

[4] Underscoring the sensitive nature of DCAA audits, the Defense Contract Audit Agency Manual, p. 1-506, instructs DCAA auditors as follows:

Perform audits in such privacy as warranted under the circumstances, and provide all necessary safeguards of contractor-confidential data. Working papers, audit reports, unpublished financial statements . . . and other records and sources available to or in the possession of the auditor usually contain information which the contractor regards as confidential. Use such information only for performance of official duties. *The auditor shall not disclose the information to other persons except with the contractor's permission, and shall not discuss information in a manner which might permit disclosure to unauthorized persons.* [Emphasis added.]

[5] Thus, on February 11, 1991—two years after the action was commenced—Hughes, in response to a Freedom of Information Act ("FOIA") request by Schumer's then-counsel, objected to the release of any DCAA documents concerning Hughes' accounting practices on the grounds that the documents would "contain 'trade secrets and commercial or financial information' which is 'privileged or confidential' to Hughes under exemption (b)(4) of 5 U.S.C. § 552 [*i.e.*, the FOIA]." J.A. 119. Hughes receded from that position regarding a second FOIA request by Schumer's counsel in light of the overlap between the FOIA request and the court discovery in this case, and particularly in light of the fact that the court had issued a protective order covering the documents in question. J.A. 125-27, 130 & Docket No. 70.

In response to Hughes' second motion to dismiss, Schumer contended that the issuance to Hughes of the various DCAA documents did not constitute a "public disclosure." Docket No. 118. Schumer also contended that his action is not "based upon" the disclosure of those documents, stating in a declaration submitted with his opposition papers that he had seen no audit reports at the time his suit was filed and that he did not derive his allegations therefrom. *Id.*; J.A. 186.[6] Finally, Schumer contended that he was an "original source" and thus was exempt from the "public disclosure" bar. Docket No. 118.

The district court again summarily denied Hughes' motion to dismiss for lack of jurisdiction. J.A. 196.

5. At the same time that Hughes moved to dismiss based on the "public disclosure" bar, Hughes also moved for summary judgment on the merits. Hughes contended that it had fully disclosed the basis of its cost accounting system to all of its customers and that the Company had complied with all applicable contractual and regulatory requirements relating to cost allocation—including its obligation, pursuant to Public Law 91-379 § 719(h) (current version at 41 U.S.C. § 422(h))—to provide to the Government, as a condition of contracting, a Cost Accounting Standards Board (CASB) Disclosure Statement.

After full briefing of all issues—including the inadequate disclosure issues raised by Schumer's complaint—the district court granted summary judgment on the ground presented by Hughes, *viz.*, that Hughes had complied with all applicable regulatory and contractual requirements and had made no false or misleading state-

[6] While Schumer's testimony that he had not seen the audit reports stands undisputed, there is conflicting evidence as to whether Schumer had read the redacted "Form 1" prior to filing suit. *Compare* Docket Nos. 44, 263 *with* J.A. 83. But Hughes has *never* contended that the Form 1's one-paragraph description of the alleged accounting violations contains enough information to have formed the basis of the allegations in Schumer's complaint.

ments to Northrop or, in its Disclosure Statement, to the United States.[7]

B. The Ninth Circuit Opinion

Schumer appealed on the merits, and Hughes cross-appealed on the denial of the Company's motion to dismiss for want of jurisdiction.

The Ninth Circuit affirmed the district court on the jurisdictional issue. On the merits, the Ninth Circuit affirmed in part and reversed in part, remanding two claims to the district court for further proceedings.

First, the Ninth Circuit held that there is a genuine issue of material fact with respect to whether Hughes had made a misleading disclosure to Northrop regarding the costs that would be charged to Northrop in connection with a particular type of advanced radar data processor ("RDP") that Hughes proposed to supply to Northrop for the B-2. Pet. App. 19a-20a.

The Ninth Circuit pointed out that Northrop's chief contracting officer, R.K. Blakeney, had stated in a February 20, 1986 "White Paper" that, in December 1982, Hughes had proposed an advanced RDP to be used in the B-2 "with no . . . cost impact attendant thereto," and that, on that basis, Northrop approved the proposal in 1983.

[7] In his papers filed in opposition to the summary judgment motion Schumer contended (i) that Hughes' CASB Disclosure Statement was incomplete and misleading; and (ii) that Hughes had violated 48 CFR § 99-401.50, a procurement regulation known as "CAS 401," by using a different cost accounting system for charging costs to contracts than the Company had used for estimating costs when it bid the contracts.

In reply, Hughes argued that the CAS 401 claim—and *only* that claim—was outside the scope of Schumer's suit because it was "unrelated to the allegations" in the complaint. J.A. 191-95. Hughes did not make that argument with respect to Schumer's Disclosure Statement claim; indeed, Hughes fully addressed that claim in its initial set of moving papers. *See, e.g.*, J.A. 147-156 (showing, *inter alia*, Hughes' discussion of Disclosure Statement issues in its Statement of Uncontroverted Facts).

According to Blakeney, Hughes had represented that the F-15 program was to "continue funding *all* development efforts" with respect to the advanced RDP, J.A. 24 (emphasis in original), and that Northrop therefore would not have to absorb those costs in order to obtain the advanced RDP.

The Ninth Circuit recognized that there was conflicting evidence on whether Northrop had been misled as to the costs of the RDP component of the B-2 program, Pet. App. 21a, but held that "[b]ecause a factfinder could choose to credit the conclusions reached in the white paper," *id.*, there was a "substantial issue as to the reasonableness of allowing the RDP charges," Pet. App. 19a.

Turning to the second of these merits issues, the Ninth Circuit held that there is a genuine issue as to whether the CASB Disclosure Statement that Hughes submitted to the Government adequately disclosed Hughes' system for allocating costs among government contracts. Pet. App. 25a. The submission of an accurate CASB Disclosure Statement is a condition precedent to obtaining government contracts of the type at issue here, *see infra* at 45-46, and the Ninth Circuit held that Hughes' failure to submit an accurate Disclosure Statement for the period from December 1982 to January 1984 constituted a "noncompliance" with regulations that "may have rendered the costs unallowable under 48 C.F.R. § 31.201-2(a)(3)," a regulation governing allowability of government contract costs. The Ninth Circuit then added that "[a]lthough the Administrative Contracting Officer found that this noncompliance had an 'immaterial impact' on costs, the lack of a determination of actual harm from the CAS violation does not preclude a claim under the FCA." Pet. App. 25a.

SUMMARY OF ARGUMENT

I. The courts below were correct in denying Hughes' motion to dismiss this *qui tam* action for lack of jurisdiction and in their supporting determination that, under the False Claims Amendments Act of 1986, there had not been a "public disclosure" of the information on which this suit is based.

A. Although the false claims at issue here were made prior to the enactment of the 1986 Amendments, those Amendments nonetheless are determinative of the jurisdictional issue raised by Hughes.

A "statute does *not* operate 'retrospectively' "—and thereby trigger the presumption against retroactivity—"merely because [the statute] is applied in a case arising from conduct antedating the statute's enactment." *Landgraf v. USI Film Products,* —— U.S. ——, 114 S.Ct. 1483, 1499 (1994) (emphasis added). Rather, retroactivity concerns arise only where the application of a newly-enacted statute would "attach[] new *legal consequences* to events completed before [the law's] enactment." *Id.* at 1499 (emphasis added). The 1986 Amendments to the *qui tam* bar provision do not do so.

Those Amendments do not change the duties of those submitting claims to the United States or the correlative rights of the Government. Nor do those Amendments create a new cause of action where there was none before, change the substance of the extant cause of action, or alter a defendant's exposure for a false claim by even a single penny. Rather, all that the Amendments to the *qui tam* bar do is liberalize the conditions under which the federal courts can entertain FCA suits by one of the two kinds of plaintiffs the FCA always has empowered to bring suit. The statute is thus precisely the kind of law that *Landgraf* teaches should be applied upon enactment to all cases.

B. The 1986 Amendments do no bar this action, because there was no "public disclosure" of the allegations on which the action is based.

1. In the context of the FCA, "public disclosure" connotes disclosure in a manner that opens the disclosed information to any and all members of the public. That interpretation accords with settled canons of construction by giving "operative effect" to the word "public," rather than treating all disclosure as *ipso facto* public. Moreover, that interpretation is compelled by the legislative history of the 1986 Amendments which shows that the word "public" was added to those Amendments at a critical juncture in the legislative process—and quite deliberately—to provide a word of limitation assuring that *qui tam* suits based upon "non-public" disclosure would not be barred. And, reading "public disclosure" to mean disclosure in a manner open to the public at large strikes a balance on the bringing of *qui tam* suits that accords with the overall policy judgments and goals underlying the 1986 Amendments.

2. When all is said and done, the *only* "disclosures" at issue here were communications between the United States and its contractor and subcontractor concerning their contractual relationship. Whatever the precise metes and bounds of "public disclosure" for purposes of the *qui tam* bar, at the very least it requires disclosure to a member of the public, *as a member of the public.* To say that when the United States communicated with Hughes about Hughes' cost allocation methods the Government was making a "public disclosure" strains the English language beyond the breaking point.

From the standpoint of the policies underlying the *qui tam* bar, communications between the Government and its contractors are different in kind from communications with an individual *qua* member of the general public. Recipients of the former type of communications understand that they are receiving the information as agents of the contractor and that the information is otherwise being held in confidence; in contrast, when information is communicated to an individual as a member of the public, that individual is free to communicate the information to others. Thus, interpreting "public disclo-

sure" so as to require, at a minimum, a disclosure to a member of the general public as such furthers the underlying policies of the Act.

II. On the merits, the court below correctly held that Hughes was not entitled to summary judgment on the claims that Hughes violated the FCA by submitting a Cost Accounting Standards Board Disclosure Statement which failed to disclose Hughes' method for allocating development costs to the B-2 contract.

A. Contrary to Hughes' submission, the FCA reaches both (i) persons who knowingly make claims that are false or fraudulent in their own terms, such as inflated claims; and (ii) persons who knowingly make false statements to obtain payment of a claim, including false statements about the claimant's eligibility for a Government payment. The United States is entitled to define the substantive and procedural conditions that must be met before federal funds will be committed. And, if a claimant cannot (or believes it cannot) meet those conditions and deceives the Government as to its having met those conditions, the claimant commits a fraud that is actionable under the FCA, even if, in a given case, the claimant is able to prove *ex post* that a truthfully-informed Government would have made the same payment in any event.

B. In the instant case, even if Hughes' failure to include in its Disclosure Statement any information about its cost allocation system did not ultimately cause the Government to pay increased costs—and that is a disputed issue at this stage of the proceedings—it is undisputed that Hughes was required, as a condition of contracting, to accurately disclose its cost allocation system and that Hughes did not do so. Because the purpose of the Disclosure Statement requirement is to protect the public fisc in the long run, false Disclosure Statements lie at the very core of false statements that can form the predicate for FCA cases. Accordingly, the non-disclosure claim here was properly remanded for trial on the merits.

ARGUMENT

I. THE COURTS BELOW WERE CORRECT IN ASSERTING JURISDICTION OVER THIS *QUI TAM* ACTION

Since 1863, the False Claims Act has made persons who knowingly submit a false or fraudulent claim to the United States liable to the Government. For all that time, the FCA has authorized the United States to bring false claim suits in its own name and, at the same time, has authorized private parties to serve as nominal plaintiffs ("relators") and to bring such *qui tam* suits in a representative capacity on behalf of the United States. The rules of law and of liability are the same in Government-initiated, and in relator-initiated, FCA suits.

As originally enacted, the *qui tam* provision of the FCA authorized "any person" to prosecute a claim on behalf of the United States. Act of March 2, 1863, ch. 67, 12 Stat. 696. In 1943, Congress narrowed this authorization by providing that the courts "shall have no jurisdiction to proceed with [a *qui tam* action] based upon evidence or information in the possession of the United States." Act of December 23, 1943, Pub.L. No. 213, 57 Stat. 608.[8] Then, in the False Claim Amendments Act of 1986, Pub.L. 99-562, 100 Stat. 3153 ("the 1986 Amendments"), Congress changed course, and liberalized its authorization of *qui tam* actions by lowering the jurisdictional bar. Specifically, the 1986 Amendments preclude "jurisdiction over an action" only where that action is "based upon the public disclosure of allegations or trans-

[8] In 1982, Congress reenacted the FCA as part of a general recodification of Title 31 of the United States Code. Pub. L. No. 97-258, 96 Stat. 978. As recodified, the Act directed the courts to "dismiss an action . . . based on evidence or information the Government had when the action was brought." This recodification, as petitioner correctly notes, "was intended to 'restate' the previous provision 'without substantive change.'" Pet. Br. at 28 n.13, *quoting* H.R. Rep. No. 651, 97th Cong. 2d Sess. 1 (1982). Indeed, § 4(a) of the recodification expressly states that the restated provisions "may not be construed as making a substantive change in the laws replaced." 96 Stat. 1067.

actions" in specified types of proceedings or in specified types of documents.[9] This section of the FCA currently is codified at 31 U.S.C. § 3730(e)(4); for convenience we shall refer to this section, and its predecessors, as the *qui tam* bar.

The 1986 Amendments to the *qui tam* bar—and the decisions below overruling Hughes' motions to dismiss this case for lack of jurisdiction—have generated two issues antecedent to the merits of this FCA suit: first, whether jurisdiction in this case is to be determined by reference to the 1986 Amendments; and second, if so, whether the allegations that give rise to this case were "publicly disclosed" before the case was filed.[10] We treat with these issues *seriatim*.

A. The Retroactivity Issue

The instant case was filed in January, 1989, more than two years after the 1986 Amendments were signed into law, but alleges that false claims were submitted prior to the enactment of the 1986 Amendments. The threshold question posed here is whether, in denying Hughes' motions to dismiss for lack of jurisdiction, the courts below erred in holding that the lower ("public disclosure") bar contained in the 1986 Amendments—rather than the higher ("Government possession") bar contained in the 1943 Act—provides the rule of decision for cases decided after enactment of the 1986 Amendments, including cases arising out of pre-enactment conduct.

1. Hughes' argument starts from the premise that "a statute will not be given retroactive effect in the absence

[9] Even where the action is "based upon public disclosure," the 1986 Amendments allow for *qui tam* jurisdiction if the relator is an "original source" of the disclosed allegations. *See infra* at 35.

[10] As Hughes acknowledges, even if, contrary to our showing in Part B, there were a "public disclosure" here, the jurisdiction of the courts could not be determined without a further determination of two questions which the court below "did not reach": first, "whether this action is 'based upon' any such [public] disclosure"; and second, "whether Schumer was an 'original source' of the information disclosed." Pet. Br. at 24 n.9.

of 'clear intent' by Congress." Pet. Br. at 14. So far, so good. For that is assuredly *one* of the lessons that *Landgraf v. USI Film Products*, —— U.S. ——, 114 S. Ct. 1483 (1994)—this Court's recent and definitive decision on the effect of an intervening change in the law on pending cases—teaches.

But there is a second, equally clear lesson taught by *Landgraf* that Hughes elides: the "presumption against retroactivity" does not cover the field of every statutory change made after a defendant has acted. As *Landgraf* explains, a "statute does *not* operate 'retrospectively' merely because [the statute] is applied in a case arising from conduct antedating the statute's enactment or upsets expectation based in prior law." 114 S. Ct. at 1499 (emphasis added; citation omitted). Rather, the "conclusion that a particular rule operates 'retroactively' "—and hence is covered by the presumption—"comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.*

Landgraf goes on to make it clear when the application of a statute to lawsuits arising out of "conduct antedating the statute's enactment" does have a retroactive effect. Quoting Justice Story's "influential definition" of retroactivity, *Landgraf* states:

> [E]very statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective. [114 S. Ct. at 1498-99, *quoting Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (CCDNH 1814) (Story, J.)]

Put more simply, retroactivity consists of "attach[ing] *new legal consequences* to events completed before [the law's] enactment." *Landgraf*, 114 S. Ct. at 1499 (emphasis added).

Of equal importance, *Landgraf* sets out the underlying rationale—and the limits—of the retroactivity concept. "Elementary considerations of fairness," *Landgraf* explains, "dictate that individuals should have an opportunity to know what the law is"—including an opportunity to know not only the substantive legal rules but also the "extent of a party's liability" for breach of those rules—in order that such individuals can have "confidence about the legal consequences of their actions" and "conform their conduct accordingly." 114 S. Ct. at 1497, 1507.

It follows that it is changes in laws which "regulate . . . primary conduct," and which therefore "have an impact on private parties' planning," that raise retroactivity concerns. 114 S. Ct. at 1502, 1506. "[C]onsiderations of fair notice, reasonable reliance, and settled expectations offer sound guidance" in determining when application of a newly-enacted law to pre-enactment conduct would raise an issue of retroactivity. *Id.* at 1499.

Based on all these considerations, *Landgraf* states the following rule:

> When a case implicates a federal statute enacted after the events in suit, . . . the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. [114 S. Ct. at 1505]

Landgraf gives this general rule additional content by identifying categories of cases which generally do *not* have retroactive effect. Thus, "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity" even if "application of the new rule operate[s] to a defendant's disadvantage in the particular case," because "rules of procedure regulate secondary rather than pri-

mary conduct." 114 S. Ct. at 1502 & n.28. And "intervening statutes conferring or ousting jurisdiction" likewise are "regularly applied" to all cases decided after the statute's enactment, because "normally . . . jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Id.* at 1501-02, *quoting*, *Republic Nat'l Bank of Miami v. United States*, —— U.S. ——, 113 S. Ct. 554, 565 (1992) (Thomas, J., concurring).

2. After *Landgraf*, petitioner's contention that application of the *qui tam* bar in the 1986 Amendments to the instant case violates the "presumption against retroactivity" cannot withstand scrutiny.

At all times relevant herein—indeed, since 1863—the FCA has made it unlawful to knowingly submit a false claim for payment to the United States. The *qui tam* bar in the 1943 Act did not define the duties of those submitting claims to the United States or the correlative rights of the Government. And the 1986 Amendments to that bar do not essay any such definitions. The amended bar thus in no way "impose[s] new duties with respect to transactions already completed." 114 S. Ct. at 1505.

Similarly, the 1986 Amendments to the *qui tam* bar do not create a new cause of action where there was none before, change the substance of the extant cause of action, or alter a defendant's exposure for a false claim by even a single penny. The amended bar thus does not "increase a party's liability for past conduct." 114 S. Ct. at 1505.[11]

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[11] It is, of course, true that *other* provisions of the 1986 Amendments altered the substantive provisions of the FCA, *e.g.*, 31 U.S.C. § 3730(h) (making it unlawful to penalize an employee for initiating or participating in an FCA suit), and increased the penalties for FCA violations, 31 U.S.C. § 3729(a). But as *Landgraf* makes clear, "there is no special reason to think that all the diverse provisions of [a law] must be treated uniformly" for purposes of determining the applicability of such provisions to "pending cases and pre-enactment conduct." 114 S. Ct. at 1505. And, the only provision at issue here is the section of the 1986 Amendments which defines the courts' jurisdiction over *qui tam* actions.

Rather, the 1986 Amendments to the *qui tam* bar do one thing—liberalize the conditions under which the federal courts can entertain FCA suits by one of the two kinds of plaintiffs the FCA always has empowered to bring suit, the individual relator. Prior to 1986, once the United States learned of a false claim, only the Government could assert its rights under the FCA against the false claimant; as a result of the 1986 Amendments, the federal courts are open to an FCA action brought by a private relator on behalf of the United States unless there has been, *inter alia*, a "public disclosure" of the underlying allegations or transactions.

Indeed, the provisions at issue here fall squarely within *Landgraf's* teaching that jurisdictional statutes are applicable once enacted, "whether or not jurisdiction lay when the underlying conduct occurred." 114 S. Ct. at 1501. In form, the *qui tam* bar is a jurisdictional statute: that section in terms limits the circumstances in which the federal courts "shall have jurisdiction" over an FCA *qui tam* action. Procedurally, the section operates as a jurisdictional provision. Indeed, the retroactivity issue is here on Hughes' appeal from the denial of its motion to dismiss this case for want of subject matter jurisdiction, and Hughes' *certiorari* petition framed the question presented as "[w]hether the courts below erred in asserting jurisdiction over this action." Pet. at p. i. Most importantly, in substance the *qui tam* bar "speak[s] to the power of the court rather than to the rights or obligations of the parties,'" 114 S. Ct. at 1501-02, and thus is precisely the kind of statute that *Landgraf* teaches should be applied upon enactment to all cases, including those arising out of pre-enactment conduct.[12]

[12] As should be apparent from the discussion in text, we fully agree with petitioner that *Landgraf* does not require the courts to "mechanically apply any and every statutory provision using the word 'jurisdiction' to pre-enactment conduct." Pet. Br. at 20. The hypothetical Hughes posits—a statute which in terms grants "jurisdiction to award punitive damages," Pet. Br. at 21—would raise questions quite different from those raised here where the provision at issue does nothing more than define the conditions under which a relator may sue on behalf of the United States in an FCA action.

3. In the face of all this, Hughes and its *amici* advance two interrelated arguments.

(a) Hughes seeks to locate this case within the rationale for the presumption against retroactivity by arguing that the 1986 Amendments to the *qui tam* bar are "'the type of legal change that would have an impact on private parties' planning.'" Pet. Br. at 17, *quoting Landgraf*, 114 S. Ct. at 1506. Hughes' posit is that "[p]rior to 1986, a government contractor could avoid a *qui tam* lawsuit by voluntarily disclosing actual or potential contract irregularities to the Government"; after 1986, a "contractor's best efforts to avert a *qui tam* lawsuit by forthrightly addressing a problem could . . . be rendered for naught." Pet. Br. at 17-18.

What Hughes fails to recognize is that a *qui tam* lawsuit is *not* some distinct species of a claim of right—of a violation and of an attendant liability—which, prior to 1986, a contractor could extinguish by disclosing misdeeds to the United States. Rather, the *qui tam* lawsuit is a suit brought on behalf of the United States, asserting the rights of the Government, and seeking the remedies owed to the Government. Under the pre-1986 law, disclosure to the United States did *not* affect the Government's legal rights—or the contractor's liabilities—one iota. A contractor which made a disclosure to the United States under the prior law did not obtain a release from the Government.

That being so, assuming *arguendo* that prior to 1986 contractors preferred Government, rather than relator, enforcement of the FCA—and acted on that preference by putting the United States on notice that the contractor had wronged the Government—such preference would hardly amount to a "substantive legal right[]," Pet. Br. at 18, protected by the presumption against retroactivity.

(b) Hughes and its *amici* are thus left to complain that the 1986 Amendments—by lowering the bar to re-

lator enforcement of the FCA—increases the likelihood that contractors will be called to account for false claims.

We do not quarrel with the accuracy of Hughes' projection of the likely effect of lowering the *qui tam* bar. But the fact that the 1986 Amendments may increase the odds that a false claim will be challenged in court does *not* mean, as petitioner would have it, that the amended bar thereby "alter[s] the *legal* consequences of past conduct," Pet. Br. at 15 (emphasis in the original), "expands an FCA defendant's liability," Pet. Br. at 16, or alters "the *extent* . . . of liability," Pet. Br. at 18 (emphasis in the original).

Calling a thing by a name does not make it so. And, as we have seen, *Landgraf* makes clear that "legal consequences" and "liability" are defined by the substantive rules of law that define legal wrongs and the remedies for those wrongs, *not* by the rules governing the processes for securing a (previously available) remedy when a (previously-defined) legal wrong has been committed.

Indeed, the logic of petitioner's argument would apply equally had the 1986 Amendments simply directed the Justice Department to devote a higher priority to prosecuting false claims, or had those Amendments provided increased appropriations to fund additional positions to enforce the FCA. Such measures—like the changes in the *qui tam* bar—inevitably would increase the frequency with which FCA cases would be litigated.

Yet surely no putative defendant can claim any "vested right" to, or any "reasonable reliance" on, 114 S. Ct. at 1499, the level of resources the Government allocates to enforcing a particular statutory prohibition at a particular moment in time. Thus, a change in enforcement priorities cannot be said to upset "settled expectations," *id.* at 1499, even if that change leads to increased investigations—and prosecutions—of conduct occurring prior to the change in priorities. And, the fact that the means Congress chose in the 1986 Amendments to increase enforcement of the preexisting prohibition in

the FCA was to rely on private relators, rather than more Justice Department attorneys, creates no greater issue of retroactivity.[18]

In sum, the court below correctly decided to determine its jurisdiction by reference to the current version of 31 U.S.C. § 3730(e)(4).

B. The Public Disclosure Issue

It is undisputed that before respondent Schumer commenced this action, the United States had conducted a series of audits of Hughes. It is also undisputed that (i) the Government shared a report of an audit, which was classified, with authorized representatives of Hughes and Northrop who had security clearances; and (ii) that the Government transmitted certain confidential but unclassified audit reports to Hughes, and Hughes alone. *Supra* at 3-4.

The question thus raised is whether communications of this type—between the Government and its contractor

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[18] It follows that petitioner is simply wrong in analogizing the enactment of 31 U.S.C. § 3730(e)(4) in 1986 to "the situation in which a new law either shortens or lengthens a statute of limitations." Pet. Br. at 22. Statutes of limitations are statutes of repose, *see, e.g., United States v. Kubrick*, 444 U.S. 111, 117 (1979), and, once a limitations period expires on a particular cause of action, putative defendants are, indeed, entitled to order their affairs on the premise that they no longer can be sued on that cause of action. But putative defendants can not do so where, as here, the relevant cause of action never has been extinguished but in fact always could be pursued by the Government.

Petitioner's reliance on *Winfree v. Northern Pac. Ry.*, 227 U.S. 296 (1913), is equally misplaced. In *Winfree* the intervening change of law in the Federal Employers Liability Act lengthened the statute of limitations; substituted a comparative negligence rule for the preexisting contributory negligence defense; eliminated the assumption of risk defense; and invalidated employment contracts which negated liability. *Compare* Act of April 22, 1908, 35 Stat. 65-66 *with* Act of June 11, 1906, 34 Stat. 232-33. The intervening law thus "permit[ted] recovery in cases where recovery could not be had before" by eliminating defenses which "disproved the right of action." 227 U.S. at 302. Needless to say, the *qui tam* bar, in stark contrast, does not deprive government contractors of defenses to the underlying cause of action.

and subcontractor in the course of, and as part of, their contractual relationship—constitute "public disclosure" within the meaning of the *qui tam* bar. As we proceed to show, the courts below correctly answered that question in the negative.

1. The proper "starting point" is the "language of the statute itself," *Consumer Product Safety Com'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980), which in this instance provides in full as follows:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. [31 U.S.C. § 3730(e)(4)(A).]

Plainly, the operative phrase is "public disclosure." That phrase is not a defined term in the Act, and it is common ground that the phrase is "no[t] a term of art with an established common law meaning," but rather is "susceptible to a range of plausible meanings." Pet. Br. at 25.

If the phrase were to appear, for example, in the context of a statute aimed at prohibiting "public disclosure," or privileging information from such disclosure, the phrase could fairly be understood to impose a bar against Government disclosure to even a single member of the general public (since the purpose of such a law would be to keep information confidential). Conversely, it is clearer yet that a "sunshine" statute which mandates "public disclosure," would not be satisfied by Government disclosure to a single individual selected because that individual has a particular kind of on-going relationship with the Government.

Our submission here is twofold. First, in the context of this Act, "public disclosure" connotes disclosure in a

manner that opens the disclosed information to any and all members of the public. Second, whatever the precise metes and bounds of "public disclosure," at the very least it requires disclosure to a member of the public, *as a member of the public*, and thus does not encompass communications solely between the United States and an entity with whom the Government has a special relationship, such as communications between the Government and its contractor or subcontractor concerning the parties' contractual relationship. We develop each point in turn.

2. (a) It is, of course, a "settled rule that a statute must, if possible, be construed in such fashion that every word has operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). Interpreting "public disclosure" to mean disclosure in a public manner—*viz.*, in a way that opens that which is disclosed to members of the public generally—meets this test by defining a line of demarcation between "public" and "non-public" disclosure and thereby affording operative meaning to the word "public." This interpretation has the added virtue of giving the phrase "public disclosure" in the *qui tam* bar provision a distinct meaning from the unmodified word "disclosure" in 31 U.S.C. § 3730(d)(1), which authorizes a reduction in the award to a relator whose action is "based primarily on disclosures" through the same means as those specified in 31 U.S.C. § 3730(e)(4)(A).[14]

In contrast, under the interpretation proffered by Hughes—which treats disclosure by the United States to "some member of the public" as "public disclosure," and treats every non-government person "who is a stranger to the fraud" as a "member of the public," Pet. Br. at 25-26 —a disclosure and a public disclosure become all but sy-

[14] *Cf. Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal quotations omitted).

nonymous. That effectively reads the word "public" out of the statute by denying the word any discernible "operative effect."

(b) The conclusion that in drafting the *qui tam* bar Congress used the word "public" deliberately and intended it as a word of limitation so as not to bar actions based upon "non-public" disclosures is compelled by the legislative history of the statute.

The *qui tam* provisions of the 1986 Amendments originated in a bill introduced by Senator Grassley, the chairman of the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee. S. 1562, 99th Cong. 1st Sess (1985). As drafted by Senator Grassley, the bar applied when

> (A) the action is based on specific evidence or specific information the Government disclosed as a basis for allegations made in a prior administrative, civil, or criminal proceeding; or
>
> (B) the action is based on specific information disclosed during the course of a congressional investigation or based on specific public information disseminated by any news media [S. 1562, § 3730 (b)(5)] [15]

After a Subcommittee hearing, and in "response to Justice Department concerns, S. 1562, and specifically the *qui tam* provision, was significantly revised" by the Senate Judiciary Committee. S. Rep. 345, 99th Cong. 1st Sess.

[15] The text of the Grassley bill is reprinted in Hearing Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1562, 99th Cong. 1st Sess. at 4-12 (1985) (hereinafter "Senate Hearings"); the *qui tam* bar provision appears at pp. 6-7.

Under the Grassley bill, the bar applied for a period of six months or "such additional time as the court allows upon a showing of good cause"; at the end of that time, if the Government "has not initiated a civil action . . . the court shall not dismiss the [*qui tam*] action." *Id.*

A companion bill was introduced in the House by Rep. Ireland. H.R. 3317, 99th Cong. 1st Sess. (1985).

at 14 (1985). Of particular relevance here, as reported unanimously by the Judiciary Committee, the *qui tam* bar applied to actions involving allegations or transactions where there had been prior

> disclosure of specific information relating to such allegations or transactions in a criminal, civil, or administrative hearing, a congressional or Government Accounting Office report or hearing, or from the news media. [S. 1562, § 3730(e)(4), *reprinted in* 132 Cong. Rec. 17942 (July 29, 1986).] [16]

Although the Justice Department endorsed the Judiciary Committee bill, 132 Cong. Rec. 20530 (August 11, 1986), Senator Grassley continued to negotiate with his colleagues and a "broad based business coalition" and "reach[ed] a consensus," which Senator Cohen, a co-sponsor of the bill, described as "meet[ing] the concerns raised by Senator Hatch and others without in any way weakening the fundamental provisions" of the bill. 132 Cong. Rec. 17936 (July 29, 1986). That consensus was embodied in a substitute bill which Senator Grassley offered on the floor of the Senate, and which he described as making "[m]inor changes . . . in the *qui tam* section." 132 Cong. Rec. 20536 (August 11, 1986). This substitute contained the version of the *qui tam* bar that ultimately was enacted into law.

Insofar as relevant here, the substitute differed from the Committee bill in two respects. First, the substitute expanded the enumerated list of proceedings and documents which could trigger the jurisdictional bar so as to include an "administrative report, hearing, audit or investigation." Second, at the same time, the substitute added the requirement that such disclosure must be a "public" disclosure in order to bar a subsequent *qui tam* action.[17]

[16] Like the original Grassley bill, the bar provision in the Committee bill applied for a period of six months. *See supra* at n.15.

[17] The Senate passed the substitute bill which Senator Grassley offered without change. 132 Cong. Rec. 20542 (Aug. 11, 1986). The House thereafter passed a bill which closely resembled the

Three aspects of this evolution of the *qui tam* bar provision are especially worthy of note.

First, under both the Grassley bill and the Senate Judiciary Committee bill, the bar applied only where a disclosure took place in a forum or through a type of document which is "public" in the sense of being open to the public generally. The types of disclosures that raised the Grassley bill's bar—disclosures that were "a basis for allegations made in a prior administrative, civil, or criminal proceeding" or occurring "in the course of a congressional investigation"—were quite limited. And their common characteristic was to cover proceedings that generate an open, public record. The Committee bill expanded the bar somewhat, but only by adding other public fora and public documents, specifically "congressional or Government Accounting Office reports or hearings."

In the context of these bills, then, the word "public" would have been all but redundant since the bar was triggered only by proceedings that are typically public and by documents that are public by their very nature.[18]

Second, and as a corollary of the first, both the Grassley bill and the Senate Judiciary Committee bill contemplated that not *all* disclosures by the Government to one outside the Government were of a type to generate the *qui tam* bar. In particular, under both bills, relators who obtained their information through sources other than the enumerated types of proceedings and documents—including relators who obtained their information from *Government documents* outside of an "administrative, civil, or

original Grassley bill. *Id.* 23345 (Sept. 9, 1986). When the bill returned to the Senate, Senator Grassley offered yet another substitute, but one which was identical to the Senate-passed bill on the provision at issue here. *Id.* 28833 (Oct. 3, 1986). The House then accepted the new Senate bill at the close of the Ninety-Ninth Congress. *Id.* 29315 (Oct. 7, 1986).

[18] Indeed, the Senate Committee report described the Committee bill as embodying a "public disclosure" requirement. S. Rep. 345, *supra*, at 28, 30.

criminal proceeding" or a "congressional or GAO report or hearing"—were *not* barred from suing on behalf of the Government.

Third and finally, as the bill progressed through the legislative process, the list of the types of proceedings and documents which could give rise to a bar was expanded to include some sources—specifically, "administrative reports, audits, and investigations"—which, as Hughes correctly states, "typically remain[] unknown and indeed incomprehensible to all but a few members of the public." Pet. Br. at 25. But, at the very moment in the legislative process when the bar provision was broadened in this way, the congressional draftsmen replaced the prior formulation—"disclosure . . . in . . ."—with the formulation "*public* disclosure . . . in . . ." The addition of the word "public" at this critical juncture thus served to capture the concept that had been integral to the bill throughout: that *not* every suit based upon information disclosed by the Government to a person outside the Government is a "parasitic" lawsuit that Congress wanted to bar from federal court, and that disclosures of allegations should *not* serve as a bar unless the disclosure is public in nature.

In the face of this history, Hughes' notion of "public disclosure" reduces to the proposition that while the draftsmen were at work crafting the compromise language that was ultimately enacted into law, they gratuitously—indeed, on Hughes' notion, whimsically—added the word "public" without intending the word to have a meaning. That argument collapses of its own weight.

(c) Reading "public disclosure" to mean disclosure in a manner open to the public at large makes sense not only of the language, structure and history of the Act but of its underlying policies as well.

The 1986 Amendments were enacted to combat what Senator Grassley termed "rampant fraud" in government programs and procurement. *Senate Hearings, supra* n.15, at 2. Relying on a study by the General Accounting

Office, the Senate Judiciary Committee found that "[f]raud permeates generally all Government programs ranging from welfare and food stamps benefits to multimillion dollar defense procurement," and that estimates of the cost of the fraud were as high as $10 to $100 billion annually." S. Rep. 345, *supra*, at 3. Of particular concern was "defense procurement fraud," which by itself was estimated to cost "$1 to $10 billion," and to involve large numbers of defense contractors. *Id.* at 2-3.

Part of Congress' response to this problem was, of course, to toughen the substantive and liability provisions of the False Claims Act, including providing for treble (rather than double) damages. *See* Pub. L. No. 99-562, § 2, 100 Stat. 3153. In addition, Congress sought to facilitate Government investigations and prosecutions through procedural rule changes, *id.*, § 5, 100 Stat. 3158, and by empowering the Attorney General to serve "civil investigative demands" on any person possessing "material or information relevant to a false claims law investigation," *id.* § 6, 100 Stat. 3158-68.

At the same time, the 1986 Congress was persuaded that the Government could not be relied upon alone to combat the "rampant fraud" in government programs. The Senate Judiciary Committee noted with alarm that "most fraud referrals [to the Justice Department from other Executive Branch agencies] remain unprosecuted and lost public funds, therefore, remain uncollected." S. Rep. 345, *supra*, at 4. Congress in turn attributed this lax enforcement to "a lack of resources on the part of Federal enforcement agencies"—a limitation which the Senate Judiciary Committee described as "perhaps the most serious problem plaguing effective enforcement." *Id.* at 7. And the Committee noted that "with current budgetary constraints, it is unlikely that the Government's corps of individuals assigned to anti-fraud enforcement will substantially increase." *Id.*

Thus, an essential purpose of the 1986 Amendment was to

> allow and encourage assistance from the private citizenry which can make a significant impact on bolstering the Government's fraud enforcement effort. The idea of private citizen aid in false claims actions is, of course, not a new one, but dates back to the original enactment of the False Claim Act in 1863. Additionally, in other areas of enforcement, such as antitrust and securities violations, the number of private enforcement actions far exceeds those brought by the Government. [S. Rep. 345, *supra*, at 8.]

On the floor of the Senate, Senator Grassley added that the "job is simply too big if Government officials are working alone." 132 Cong. Rec. 20535 (Aug. 11, 1986). And, Congress' commitment to creating a solid "partnership between public law enforcers and private taxpayers," *id.*, is manifest in a number of the provisions of the 1986 Amendments not at issue here. For example, those Amendments increased the awards for successful relators and added a new section prohibiting retaliation against an employee who initiates a *qui tam* action. *See* 31 U.S.C. §§ 3730(d), (h).

That same commitment is manifest as well in the changes the 1986 Amendments made in the *qui tam* bar. As we have seen, prior to 1986 the FCA barred *qui tam* suits "based upon evidence or information in the possession of the United States." Given the problem of inadequate prosecutorial resources and of cases being referred to the Justice Department by other Executive Branch agencies and going nowhere, Congress concluded that the mere fact that the Government possessed, or indeed had investigated, information which formed the basis for a *qui tam* action should no longer be the dividing line separating lawsuits that would be barred from lawsuits that would be encouraged. Instead, the 1986 Amendments redrew that line at the point at which "public disclosure" had occurred.

Against this background, the jurisdictional line makes sense if—but only if—the term "public disclosure" is understood to mean disclosure in a manner that opens the

disclosed information to members of the public at large. Once allegations are disclosed in this way—once they truly enter the public domain—those allegations then can be pursued by Congress, by private watchdog groups, and, of course, by the media. Thus, allegations of wrongdoing by a contractor which are in the public domain can generate pressure on the Executive Branch to respond to those allegations with vigor, and make a lack of vigor a matter for public censure. As Justice Brandeis observed many years ago, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." L. Brandeis, *Other People's Money* 62 (National Home Library ed. 1933).

A jurisdictional bar triggered by disclosure of allegations in a manner that opens the disclosed information to the public generally, in other words, strikes a balance on the bringing of *qui tam* suits that accords with the overall policy judgments and goals underlying the 1986 Amendments. Absent such a public disclosure, the danger that the Government will fail to act and that its inaction will go unnoticed is at its maximum; thus, in the eyes of the 1986 Congress, a *qui tam* relator who pursues allegations that are not yet public makes a contribution to the war against fraud. But once a public disclosure occurs, the danger the allegations will be overlooked or ignored by the Government is diminished, and after that point a subsequent *qui tam* suit derived from that information can be seen as adding little marginal value and hence as being appropriate to bar.

In contrast, Hughes' expansive reading of the bar to cover any disclosure makes nonsense of Congress' work. Hughes does not explain, because it cannot, why Congress would choose to eliminate the "Government possession" bar and then reimpose the bar as soon as the Government discloses its information to a single person, no matter what the basis for the disclosure or the circumstances. Surely, the fact that information from a Government audit or investigation has been conveyed to a single

individual or a single entity provides no assurance that the Government is "on the trail of the . . . fraud," as Hughes contends, Pet. Br. at 29.[19]

(d) For all of these reasons, we submit that the phrase "public disclosure" in 31 U.S.C. § 3730(e)(4) is properly read to mean disclosure in a public manner, *viz.*, disclosure which opens the disclosed information to members of the public generally.

On that reading, there is no doubt that the audits at issue here were not "public[ly] disclos[ed]" prior to this lawsuit. Those audits were not released to the general public. They were not published in any publicly-available document. And, they were not placed in any repository of documents or records open to the general public. On no theory, then, can it be said that they were opened to the public at large. It follows that there was no "public disclosure" within the meaning of § 3730(e)(4).

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[19] Hughes pretends that the *qui tam* bar applies only when a public disclosure occurs "*in the course of* an investigatory or enforcement action," Pet. Br. at 25 (emphasis added), or "in a manner that established that [the Government] had not abdicated its law-enforcement responsibilities," *id.* at 34; *see also id.* at 29, 30. In truth, however, a "public disclosure," *as Hughes defines the term*, can occur in circumstances where no law enforcement activity at all is underway, or when such activity is, or has been, prematurely abandoned. Indeed, it is not at all clear that the Government needs to be the maker—or even the recipient—of a disclosure for it to be a "public disclosure" under the statute; disclosure in a "civil hearing" where the only parties are private litigants has been stated by the lower courts to be a "public disclosure." *See, e.g., United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 652 (D.C. Cir. 1994).

What *is* clear is that if Congress had sought to make an open and active Government investigation the triggering event of the *qui tam* bar, it scarcely could have chosen a more opaque means of expressing that intent. And, Congress' concern that cases investigated by Executive Branch agencies were being referred to the Justice Department without being made the basis for FCA suits, *see supra* at 26, would be left wholly unaddressed if a Government "report," "audit," or "investigation" without more (or with only the negligible tad more that Hughes' definition of "public disclosure" adds to the equation) raised the *qui tam* bar.

3. We would be derelict if we did not add that when all is said and done, the *only* "disclosures" at issue here were communications between the Government and its contractor and subcontractor concerning their contractual relationship. Those communications were addressed to Hughes' management, *qua* management, and were disseminated within the corporate structure to other Hughes' employees (*qua* employees) as needed to enable the Company to respond to the Government. The scope, manner, and nature of those communications were occasioned by—and were defined by—this particular relationship between the parties and the particular needs of the parties to that relationship.

Whatever else is true, we submit, the term "public disclosure" cannot be interpreted to encompass such communications that take place within the confines of a contractual relationship between parties to the contract and that do not involve disclosure to even a single member of the public *qua* member of the public.

(a) We again begin with the statutory language. While the phrase "public disclosure" is, as we already noted, "susceptible to a range of plausible meanings," *supra* at 20, *quoting* Pet. Br. at 25, it is *implausible,* to say the very least, to label as "public disclosure" communications between two parties who have a particular kind of on-going relationship about matters within the scope of that relationship and as an integral part of that relationship. Even if the word "public" does not require disclosure to the public at large, at the very least it connotes disclosure to some *in* the *general* public as such. Thus, to say that when the United States communicated with Hughes about Hughes' cost allocation methods the Government was making a "public disclosure" strains the English language.

EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981), provides a helpful analogy. At issue in that case was a provision of Title VII which makes it unlawful for the EEOC to "make public in any matter whatsoever any

information obtained by the Commission" pursuant to its statutory authority. 42 U.S.C. § 2000e-8(e). The question posed was whether "disclosure of information in a Commission file to the employee who filed the Title VII claim is a public disclosure." 449 U.S. at 592. The Court answered that question in the negative with respect to the employee's *own* file, but not with respect to the "files of other charging parties who have brought claims against the same employer." *Id.* at 603. The Court explained that with respect to the investigative file on his own charge, the charging party "cannot belong to the public to which Congress referred" whereas "[w]ith respect to all files other than his own, he is a stranger." *Id.*

Associated Dry Goods illustrates that even when "public disclosure" is used in its broadest sense for the purposes of keeping information strictly confidential—and thus out of the hands of any and all members of the general public—there are nonetheless certain individuals and entities who are not part of the general public because of their particular relationship with the Government in a particular context. Communication to such a person within such a relationship—such as the communication to the charging party in *Associated Dry Goods*—does not constitute "public disclosure." That lesson applies *a fortiori* in the instant case, where the statute at issue is not a privacy or non-disclosure statute but a statute that *requires* a "public disclosure" to trigger the *qui tam* bar.[20]

(b) Interpreting "public disclosure" so as to require, at a minimum, a disclosure to a member of the general

[20] *See also Consumer Product Safety Com'n v. GTE Sylvania, supra* (interpreting a statute, 15 U.S.C. § 2055(b), authorizing the CPSC to investigate the safety of consumer products and requiring the CPSC, "prior to" making "public disclosure of any information obtained under this Act," to give "each manufacturer . . . of any consumer product to which such information pertains" advance notice of a proposed "public disclosure" and an opportunity to rebut the information; under the statute, communication with the manufacturer is thus *antecedent to* the "public disclosure" and is *not* itself a "public disclosure").

public as such also furthers the underlying policies of the Act.

When information is communicated to an individual as a member of the public, that individual is free to communicate that information to others. The information thus has at least the generative potential of entering into the public discourse even if it has been conveyed only to a single member of the general public.

But when information is communicated to an individual because he or she has some special capacity, and is not also communicated to anyone in the public at large, the individual may well feel constrained to keep the information confidential. That is especially true if dissemination of the information outside the protected relationship could be viewed by the recipient's employer to be improper or detrimental to its interests.

No one would contend, for example, that a "public disclosure" occurs when one government employee informs another government employee, as a co-worker, of allegations of fraud under investigation, even though both individuals are members of the public as well as government employees. Similarly, if the United States were to retain an outside investigative agency, auditor, or law firm to pursue evidence of fraud and disclose that evidence to employees of the entity thus retained, those communications could hardly be termed "public disclosure."

So, too, when the United States communicates with a contractor, through the contractor's authorized representatives, about claims submitted to the Government by the contractor under the contract, those communications are, in the nature of things, non-public. The recipients of the communication understand that they are receiving the information as agents of the contractor, and that the information is otherwise being held in confidence.

The communications in question here underscore this point. The Defense Contract Audit Agency instructs its personnel that they "shall not disclose [audit] information to other persons except with the contractor's permission."

See supra at 3-4. And, the recipients may well feel a duty —or at least a sense—of loyalty to their employer and an obligation to keep information learned in confidence, at work, confidential. Given the nature and purpose of the *qui tam* bar such communications are thus different in kind from a communication with an individual *qua* member of the general public.[21]

(c) In practical terms, the consequence of treating communications between the United States and its contractors as "public disclosures" would be to bar *qui tam* suits whenever an investigation, or even a routine audit, by an agency of the Government, is commenced—without regard to whether the inquiry is performed thoroughly and pursued diligently or instead is performed perfunctorily and abandoned precipitously. Any time the Government receives any allegation of wrongdoing—and certainly any time the Government commences an audit or investigation —there almost certainly will be communications with the contractor in the form of a notice, a request for information or the like. Given Congress' concern that even fully-investigated cases were being dropped by the Justice Department after being referred to it, a rule which barred *qui tam* suits whenever an audit or investigation is commenced would thwart a principal purpose of the 1986 Amendments.

Significantly, Hughes attempts to limit the sweep of its argument by relying on *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322-23 (2d Cir. 1992), to argue that public disclosure occurs only when "allegations of fraud are revealed to members of the public *with no prior knowledge thereof*," *viz.*, to "strangers to the fraud." Pet. Br. at 25-26.

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[21] *A fortiori*, if a disclosure is made by the Government to an agent of a contractor who is affirmatively restricted from making further disclosure—such as when the Government transmits classified information—there plainly is no "public disclosure." For this reason, the disclosure to Northrop of the classified Air Force report cannot, even on the broadest conception of the term, be a "public disclosure."

But Hughes never deigns to explain why, on its view of the law, communications with those particular individuals within a corporate organization who have prior knowledge do not constitute "public disclosure" whereas communications with "strangers to the fraud" do. Both classes of individual are equally "members of the public." And disclosures to both classes are equally indicative—or, more precisely, non-indicative—of whether the Government is, in fact, prepared to bring an enforcement action with respect to the information being disclosed.[22]

The truth of the matter is, of course, that in these cases the United States is communicating with the contractor as an entity, *qua* contractor, and not with any individual as such. The contractor, by hypothesis, is not a "stranger to the fraud"; it is the responsible party. More importantly, the contractor, by hypothesis, is not a "stranger" to the contractual relationship and hence is not part of the relevant public for FCA purposes. Consequently, on any theory, the communications between the Government and Hughes did not constitute public disclosure of the allegations against Hughes.

For all these reasons—as well as the alternative reasons canvassed in the prior section of our "public disclosure" argument—we submit that the communications here between the Government and its contractors within their contractual relationship and as an integral part of that

[22] The rule Hughes proposes is not only unprincipled but impractical as well. On Hughes' theory, the existence *vel non* of a bar apparently turns on, and requires a determination as to whether, the individual addressee of a United States communication to a corporation was a "stranger to the fraud." If the United States happened to communicate with an "innocent" employee of the corporation, then only the Government can enforce its FCA rights against the contractor; if the Government communicated with a "guilty employee," a relator is free to proceed with a *qui tam* suit on behalf of the Government. And, mind-bending problems of application would arise when the initial communication is addressed to an employee with prior knowledge, but the communication is received by, shared with, or seen by a "stranger to the fraud."

relationship do not constitute "public disclosure" of the allegations and/or the transactions put in issue in this case.

4. Hughes champions an alternative interpretation of the statute whose principal virtue, Hughes claims, is to preclude every *qui tam* suit based on publicly-disclosed information. But not even Hughes' construction of the Act can achieve that result, since on *any* reading of 31 U.S.C. § 3730(e)(4)(A), the *qui tam* bar applies only to information disclosed through specified types of proceedings or documents, and the bar cannot be raised by disclosure occurring through non-specified proceedings or documents. Thus, even on its own terms, Hughes' interpretation fails to make sense of the statute.

Moreover, the end Hughes is pursuing is one that fits Hughes'—rather than Congress'—purposes.

Hughes would have it that the "whole point" of the *qui tam* provision generally, and the jurisdictional bar in particular, is "to encourage whistleblowers to expose previously undisclosed fraud against the Government"; all other putative *qui tam* relators, says Hughes, are " 'parasitic' plaintiffs," properly barred from court. Pet. Br. at 23. That, Hughes states, was "the traditional understanding," and, according to Hughes, the point of the 1986 Amendments was to "preserve[] the FCA's traditional distinction between 'whistleblower' and 'parasitic' actions." Pet. Br. at 29-31.

Hughes' view of the world—and, most particularly, its definition of "parasitic" actions—was not the 1986 Congress' view. That is clear from the following considerations.

First, if Congress' sole purpose in relaxing the jurisdictional bar in the pre-existing law was to open the door to whistleblowers "with significant information to contribute on their own," and *only* to such whistleblowers, Congress could have achieved that purpose simply by adding an "original source" exception to the "Government possession" bar then in place. Yet Congress manifestly did more: the 1986 Amendments both added an "original

source" rule and *also* substituted "public disclosure" for "Government possession" as the litmus for the *qui tam* bar.

Second, even on Hughes' reading of the statute, one consequence of the 1986 Amendments is to allow a relator who is not an "original source" whistleblower—a relator who is proceeding entirely on information known to the Government—to bring suit if there is not "any public disclosure." Such a suit would have been barred prior to 1986, under the old Government possession rule. Yet if, as Hughes contends, Congress' sole purpose was to encourage original source "whistleblowers"—if those who have no new information "add[] nothing of value," Pet. Br. at 32—Congress surely would not have removed the bar to such actions.

The short of the matter is that Hughes has identified only one of Congress' purposes in amending the *qui tam* bar in 1986. Congress intended to encourage "original source" whistleblowers, to be sure. But Congress also was of the view that Government enforcement of the FCA was sufficiently unreliable that relators who commence an FCA action can "add value," even if the relators' information is not "original." That explains why Congress chose both to allow original source actions and also to substitute a "public disclosure" bar for the "Government possession" bar.

Hughes is thus left to argue that, at the very least, relators whose knowledge is derived from the Government are parasitic plaintiffs because, Hughes asserts, they contribute nothing to advancing the goals of the statute.[23]

[23] Indeed, Hughes' theory, as articulated to the courts below, in fact goes even further than barring all relators who obtain their information from the United States. Hughes argued that once information is disclosed by the Government to a single individual, every member of the public is barred on the ground that any suit filed thereafter making allegations similar to those previously disclosed is "based upon" the "public disclosure," regardless of whether the individual bringing the suit actually derived any information from the disclosure. The only exception, under Hughes' theory, would be for a person who provided the information to the Government prior to the Government's disclosure. That person—and only that person—would fit Hughes' definition of an "original source." On this basis Hughes argued that respondent Schumer's action was barred by the disclosure of the audits to Hughes, regardless of whether Schumer derived his information from what the Government had disclosed to Hughes. Taken as a whole, then, Hughes' theory goes a long way towards reestablishing the old "Government possesion" rule in another guise.

This theory is not only inconsistent with the overall purposes of the statute, it is inconsistent as well with the central theme of Hughes' submission to this Court, *viz.*, that the "whole point" of the "public disclosure" provision is to bar those relators who derive their information from the Government.

At the same time, we recognize that on this issue—not reached by the court below and not presented here—the lower court law is in disarray. While Hughes' view of the meaning of "based upon" finds support in case law in the Second and Tenth Circuits, and some indirect support in the Ninth Circuit, the Fourth Circuit has persuasively criticized the Second and Tenth Circuit decisions for departing without basis from the plain language of the statute. *Compare United States ex rel. Kreindler & Kreindler v. United Technologies*, 985 F.2d 1148, 1158 (2d Cir. 1993) (adopting Hughes' view of "based upon"), *cert. denied*, 113 S. Ct. 2962 (1993) and *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548, 552 (10th Cir. 1992) (same), *cert. denied*, 507 U.S. 951 (1992) *with United States ex rel. Siller v. Becton Dickinson Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994) (holding that "based upon" means "derived from" and not "similar to"), *cert. denied*, 115 S. Ct. 316 (1995). *Cf. United States ex rel. Devlin v. State of California*, 84 F.3d 358, 362 (9th Cir. 1996) (suggesting inferentially that "based upon" means "similar to" and not "derived from"). Similarly, Hughes' view of the "original source" requirement finds both support and criticism in the circuit court case law. *Compare United States ex rel. Wang v. FMC Corporation*, 975 F.2d 1412 (9th Cir. 1992) (supporting Hughes' position) *with Siller, supra* (rejecting that position as inconsistent with the plain language of 31 U.S.C. § 3730(e)(4)(B), which defines "original source").

But that would be true only in a world in which, as Hughes blithely assumes, "public disclosure," assured that the Government both "has undertaken active steps to investigate particular allegations of wrongdoing," Pet. Br. at 32, and has not "abdicated its law-enforcement responsibilities," *id.* at 34. But if, as Hughes contends, public disclosure means disclosure to any member of the pub-

lic, including the involved contractor itself, then such disclosure provides no assurance at all of law enforcement rigor—as Congress understood.

This is not to say that in fact, or in Congress' eyes, a relator whose suit is based upon information learned from the Government through a non-public disclosure—*e.g.*, an employee of a contractor who has been privy to audit communications from the Government—stands on the same footing as a person bringing a case based on independent knowledge. To the contrary, at the same time that Congress amended the jurisdictional bar, Congress also added to the FCA a separate provision requiring a court, in *qui tam* cases joined by the Government, to *reduce or eliminate* the award to the *qui tam* relator if the action is "based primarily on disclosures" of Government information "other than information provided by the person bringing the action." 31 U.S.C. § 3730(d)(1). Specifically, in lieu of receiving an award in the range of 15 to 25 percent, such a relator may receive no more than 10 percent. *Id.*

This "knock down" provision answers Hughes' concern about providing "a windfall" to relators whose suit is based on information learned from the Government in the course of an active Government investigation. Those relators who are truly opportunistic, and who are merely seeking to hitch a free ride on a case the Government is prepared to bring without the relator's assistance, can be knocked down to zero. Conversely, those relators whose diligence caused a prematurely abandoned investigation to be revived as a result of the *qui tam* suit can receive 10 percent, even if they contributed no *new* information but simply saw the potential in old information that had been neglected.

For all these reasons, the court below correctly decided to assert jurisdiction over this action.

II. THE FALSE CLAIMS ACT IMPOSES LIABILITY ON A CLAIMANT WHO KNOWINGLY MISREPRESENTS OR OTHERWISE MISLEADS THE GOVERNMENT ABOUT THE CLAIMANT'S ELIGIBILITY FOR A GOVERNMENT PAYMENT.

On the merits, the Ninth Circuit remanded two claims to the district court for further proceedings: first, the claim that Hughes, by making inaccurate or incomplete statements to Northrop concerning the cost impact of a particular type of advanced Radar Data Processor (RDP), induced Northrop to accept a type of RDP more costly than the type Northrop would have accepted had Hughes provided a full and accurate depiction of the cost impact; and second, the claim that Hughes submitted claims for payment under the cost-plus B-2 contract without disclosing in its required Cost Accounting Standards Board Disclosure Statement, its method for allocating costs to that contract. Pet. App. 25a. As to the second claim the Ninth Circuit stated that the misleading Disclosure Statement "may have rendered" certain costs charged to the affected contracts "unallowable," and the court of appeals added, as an alternative holding, that in any event "the lack of a determination of actual harm . . . does not preclude a claim under the FCA." *Id.*

Hughes petitioned for *certiorari* only with respect to the Ninth Circuit's disposition of the CASB Disclosure Statement claim, and even with respect to that claim, Hughes' question presented was addressed only to the second of the Ninth Circuit's alternative holdings. Hughes' *certiorari* petition posed the question thusly: "Whether injury to the public fisc is an essential element of a cause of action under the False Claim Act." Pet. at i.

In its merits brief, Hughes—while continuing to focus solely on the court of appeals' alternative holding with respect to the second of the remaining claims—abandons any contention that "injury to the public fisc is an essential element" of an FCA cause of action.[24] In-

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[24] That abandonment is compelled by this Court's repeated statements that an attempt to overcharge the Government can form the

stead, Hughes "reformulates" its question in the following tautological terms:

> Whether the False Claims Act imposes liability for alleged infractions of other statutes or regulations regardless of whether such infractions result in a "false claim" against the public fisc. [Pet. Br. at i]

We agree with Hughes that the FCA creates no such *per se* liability and that the answer to this all but content-free question is "no." But it does *not* follow—as Hughes suggests by phrasing its question in this way—that claims that constitute "infractions of other statutes or regulations" cannot also be "false or fraudulent claims" within the meaning of the FCA. Nor does it follow, as Hughes argues, that the FCA reaches only "an inflated request for payment." Pet. Br. at 38.[25] As we now show, the FCA's language, its purpose and its consistent interpretation all belie Hughes' severely reductionist reading of the statute.

A. The original False Claims Act as passed in 1863 provided in operative part for the liability in damages and a forfeiture of any person who

> presents or causes to be presented, for payment or approval any claim upon or against the Government

basis of an action for civil penalties under the FCA even when the attempt fails because the Government discovers the fraud prior to payment. In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), for example, the Government discovered fraud on several of the projects at issue in time to withhold payment, and the Court nevertheless held that the claims submitted were actionable false or fraudulent claims. *Id.* at 552-553. *See also Rex Trailer Co. v. United States*, 350 U.S. 148, 153 n.5 (1956) (explaining the holding in *Marcus* on this point).

[25] In Hughes' view, "To establish liability under the FCA, the Government (or a *qui tam* relator) must at the very least allege and prove that a particular transgression resulted in an excessive demand for government money." Pet. Br. at 38. And, according to Hughes, where "an alleged infraction does not have the effect of inflating any claim against the public fisc, it is beyond the FCA's scope." *Id.*

> of the United States, . . . knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, . . . [Act of March 2, 1863, ch. 67, 12 Stat. 696]

That operative language stayed on the statute books until 1982 when as part of the recodification of Title 31 of the United States Code—and without any intent to change the FCA's substance, *see supra* at n.8—liability was imposed on any person who

> (1) knowingly presents, or causes to be presented to . . . Government . . . a false or fraudulent claim for payment or approval; or (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved. [31 U.S.C. § 3729]

And, while the 1986 Amendments made other changes to § 3729—principally with regard to remedies—those Amendments left § 3729's operative language intact.

The current words on their face thus reach *both* the making of a "false or fraudulent claim" and also the making "of a false record or statement to get a false or fraudulent claim paid or approved." While the multiplication of "falses" and "fraudulents" does not aid comprehension, the following point is clear: the provision—as its original, albeit cumbersome, language said—has always been intended to reach both (i) persons who knowingly make claims that are false or fraudulent in their own terms, *e.g.*, "inflated claims;" *and* (ii) persons who knowingly make false statements to obtain payment of a claim.

Given this statutory language—and given that the "[d]ebates at the time [the FCA was enacted] suggest that the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government," *United States v. Neifert-White Co.*, 390 U.S. 288, 292 (1968)—this Court "has consistently

refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil," *id*. Rather, the Court has properly understood the FCA as reaching any claim "grounded in fraud," and any "payment of Government money to persons who caused it to be defrauded." *United States ex rel. Marcus, v. Hess, supra,* 317 U.S. at 544.

And, this understanding is confirmed by the Senate Report on the 1986 Amendments which sums up the FCA's point as relevant here in the following terms.

> In its present form, the False Claims Act empowers the United States to recover double damages from those who make, or cause to be made, false claims for money or property upon the United States, *or who submit false information in support of claims.* In addition, the United States may recover one $2,000 forfeiture for each false claim submitted in support of a claim. . . . The United States is entitled to recover such forfeitures solely upon proof that false claims were made, without proof of any damages.
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> The False Claims Act is intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services. Accordingly, a false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation. A false claim for reimbursement under the Medicare, Medicaid or similar program is actionable under the Act . . . and such claims may be false even though the services are provided as claimed if, for example, the claimant [i.e. the physician who provided the services] is ineligible to participate in the program . . .
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> Likewise, each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim. [S. Rep. 345, *supra,* at 8-10; emphasis added]

It could hardly be otherwise. On Hughes' interpretation of the FCA, a contractor or a claimant for federal benefits can knowingly make misrepresentation or otherwise mislead the United States about the claimant's entitlement to money from the Government—but still incur no FCA liability if the claimant, *after the fact,* is able to show that, had the Government known the truth, it ultimately would have paid out the same amount of money to the claimant in any event. Put more bluntly, a contractor could lie about having complied with a precondition to payment but suffer no penalty under the FCA for so doing. Such a rule would fall far short of protecting the integrity of the claims and contracting processes.

The decision in *United States v. Rohleder,* 157 F.2d 126 (3rd Cir. 1949), illustrates the correct reading of the FCA. In that case, the Third Circuit found an FCA violation where the contractor, in seeking reimbursement from the United States of money paid to subcontractors, falsified evidence regarding competitive bidding by subcontractors to obtain those subcontracts. There was no evidence in *Rohleder* that the subcontractor to whom the work in question was awarded (and whose costs the contractor sought to recover from the Government) had inflated its bid or would have been underbid had there been the requisite competition. Nonetheless, the court held that it was enough that the misrepresentation concerned a precondition to payment—*viz.,* that a competitive bidding process had been required in awarding subcontracts; that the contractor had represented compliance with that process; and that the representation in that regard was false.

United States v. Blecker, 657 F.2d 629 (4th Cir. 1981), a case brought under the criminal analog to the FCA, 18 U.S.C. § 287, is to the same effect. There, the contractor was convicted for falsifying the educational credentials of its employees in order to receive payment from the United States at a special premium rate. Under the applicable

regulation, the contractor would have been entitled to the premium without regard to the employees' educational attainments had the contractor had demonstrated, prior to billing the Government, that the employees possessed certain "special qualifications." The court held, however, that even if the employees met the special qualifications criteria and that the Government ultimately got its "moneys' worth," that would not be a defense to the FCA indictment. 657 F.2d at 634, 635.[26]

The lesson of these cases is plain. The United States is entitled to define the substantive and procedural conditions that must be met before federal funds will be committed, be it to a food stamp applicant or to a defense contractor. And, if a claimant cannot (or believes it cannot) meet those conditions and deceives the Government as to its having met those conditions, the claimant commits a fraud that "*might* result in financial loss to the Government," *Neifert-White, supra,* 390 U.S. at 292—and hence one that is actionable under the FCA—even if, in a particular case, the claimant is able to prove *ex post* that a fully-informed Government would have made the same payment in any event.

The contracting conditions—including the competitive bidding requirement in *Rohleder* or the educational attainment condition in *Blecker*—may be designed to conserve the resources of the public fisc over the long term. Or the conditions may be designed to further other social ends, as in the cases cited by the United States in its brief *amicus curiae.* In either event, the FCA requires those making claims on the Government to deal honestly with

[26] *See also United States v. National Wholesalers,* 236 F.2d 944 (9th Cir. 1956), *cert. denied,* 353 U.S. 930 (1957) (finding contractor liable under the FCA for representing to the Government that the goods it was supplying were of a particular brand required by the contract when in fact the contractor had manufactured copies of the required brand; the fact that the copied goods supplied to the Government were determined—after testing conducted upon discovery of the contractor's deception—to have performed precisely as well as the brand required by the contract provided no defense to the contractor).

the Government in representing their entitlement to the Government's money so that the Government can rely on such representations rather than having to incur the burden of independently investigating each such representation.

None of this is to say that an FCA case can be predicated on any and all false statements made to the United States. Rather, as the text of the Act makes plain, the FCA reaches such statements only if made in connection with a "claim" which is defined as a "request or demand . . . for money or property." 31 U.S.C. § 3729(c).[27] And, in accordance with the common law understanding of "fraud," the FCA has been interpreted to impose liability only with respect to *material* false statements, *e.g., United States v. Data Translation Inc.,* 984 F.2d 1256, 1267 (1st Cir. 1992) (Breyer, J.)—*viz.,* statements that are relevant to, and hence capable of affecting, the Government's decision to pay a claim.[28]

B. Hughes contends that its failure to include in its Disclosure Statement any information about the allocation of RDP development costs to the B-2 contract did not ultimately cause the Government to pay increased costs. Whether or not that is true—and the Ninth Circuit specifically found that Hughes' noncompliance with the disclosure regulations "may have rendered" certain costs "unallowable," Pet. App. 25a[29]—it is undisputed that Hughes

[27] The decisions of this Court, and of the courts of appeals, cited by Hughes, Pet. Br. at 40-41, say no more than that which is undisputed here: that a false statement is actionable under the FCA only if made to obtain money or property belonging to the Government.

[28] *Cf. Kungys v. United States,* 485 U.S. 759, 770 (1988) ("The federal courts have long displayed a quite uniform understanding of the 'materiality' concept . . . The most common formulation of that understanding is that a concealment or misrepresentation is material if it 'has a natural tendency to influence, or was capable of influencing, the decision of' the decision-making body to which it was addressed").

[29] Given the Ninth Circuit's finding, as quoted in text, Hughes was not entitled to summary judgment here even on its own (*post-hoc*) test for determining whether the FCA has been violated.

was required, as a "condition of contracting," to accurately disclose its "cost allocation practices," 41 U.S.C. § 422(h)(1)(A), and that Hughes knowingly failed to do so. And, it is equally plain that the cost allocation disclosure is required, pursuant to an Act of Congress, precisely because

> In the absence of complete and accurate information about the cost of a contract, the Federal Government has no way of knowing whether the contractor's profits are excessively large or whether the final price is a fair price. Negotiation is thus meaningless in the absence of a clear understanding of the costs involved.
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> In most practical cost accounting situations, there are a variety of methods for allocating overhead expenses. Thus, the determination of the "true" cost of producing a given weapons system depends mainly on the particular cost accounting methods selected

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Recognizing this, Hughes attacks the Ninth Circuit's determination on allowability, principally on the asserted ground that the contracting officer made a "determination" that Hughes' costs were "allowable" and that it is "black-letter government-contracts law" that such a determination, combined with payment of that cost, "'binds the Government so that no challenge to the allowability of the cost can be maintained.'" Pet. Br. at 43-44 n.26, *quoting* J. Cibinic & R. Nash, *Cost-Reimbursement Contracting* 1106 (2d ed. 1993).

Hughes' argument is trebly flawed.

First, as the United States explains in its brief *amicus curiae*, the contracting officer did not make a "decision" on allowability of the type sufficient to bind the Government.

Second, while the contracting officer released the funds, he did so only upon making an express *reservation* of the Government's right to recover the funds in a separate court action. *See* J.A. 136.

Third, even if the contracting officer had made the requisite determination and released the funds without reservation, the "black-letter" rule which Hughes invokes is applicable, according to the very treatise cited by Hughes, only "[b]arring fraud, mistake, or lack of authority." J. Cibinic & R. Nash, *supra*, at 1105. Here, fraud is, of course, alleged.

> to allocate overhead expense. [S. Rep. No. 890, 91st Cong. 2d Sess. (1970)]

The requirement that contractors disclose their cost allocation system and bill only in accordance with that (disclosed) system is thus analogous to the requirement in *Rohleder, supra*, that the contractor competitively bid subcontracts and bill only for competitively-bid subcontractor costs. The CASB Disclosure Statement requirement, like the competitive bidding requirement in *Rohleder*, can be violated in a particular case without ultimately causing the United States to overpay, but the Disclosure Statement requirement, like the requirement in *Rohleder*, unmistakably serves to protect the Government's fiscal inteersts in the long run. And, because the purpose of the Disclosure Statement requirement is to protect the public fisc, false Disclosure Statements lie at the very core of false statements that can form the predicate for FCA cases.[30]

C. Hughes finally contends that the Ninth Circuit erred even in reaching Schumer's "allegation of inadequate disclosure to the Government." Pet. Br. 44. Relying on a statement by the Ninth Circuit, Hughes contends that "Schumer had first presented this allegation in his brief in opposition to summary judgment." Pet. Br. 44 (citing Pet. App. at 22a). And, from this premise, Hughes argues that the Ninth Circuit was wrong in holding that the district court "should [have] treated the filing as a request to amend the pleadings," and that, "[o]n remand, [Schumer's] complaint should be considered so amended." Pet. App. 22a-23a. As we proceed to show, Hughes' argument is

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[30] If, on remand, further factual development confirms Hughes' (premature, *see supra* at n.29) view that no "unallowable" costs were incurred as a result of Hughes' Disclosure Statement violation, Schumer, of course, will not be able to recover actual damages on behalf of the Government for the contract payments made to Hughes. But, the Government may have suffered other compensable injuries, such as the added costs incurred in auditing Hughes as a result of the Disclosure Statement violation. And, in any event, an inability to prove actual damages would not preclude a recovery of statutory penalties on the Government's behalf.

based on both a false premise and a misunderstanding of the decision below.

1. To begin with, the Complaint here did, in fact, encompass the issue of inadequate disclosure to the Government.[31] In particular, both the initial and amended complaints alleged that Hughes had "suppressed or concealed" information about its commonality cost allocation system from the Government, as well as from Northrop. P. 1 & n.2 *supra*. Given that "the core purpose of the complaint is to put the defendant and the court on notice of the plaintiff's claims," *Conley v. Gibson*, 355 U.S. 41, 47 (1957), those allegations were sufficient to raise the disclosure issues.

Indeed, Hughes well understood *prior* to its summary judgment motion that these allegations in the complaint encompassed Schumer's CASB Disclosure Statement claim; Hughes in fact *anticipated* the Disclosure Statement issue in its moving papers. *See supra* at n.7.

It is also very much to the point in this regard that almost a year before Hughes brought its summary judgment motion and before discovery had begun in earnest, Schumer's then-counsel said the following in open court in the presence of Hughes' counsel:

> Your honor, under the Cost Accounting Standards Board there is a Disclosure Statement filed under penalty of perjury for contracts in excess of ten million dollars where an aerospace contractor is required to reveal the method in which it will accumulate and allocate costs, *and that is what this case is all about*. [J.A. 123-24 (emphasis added).]

Against this background, Hughes' suggestion that Schumer's allegations here were "an ever-moving target," Pet. Br. at 45—or that Schumer was engaged in a "ceaseless game of cat-and-mouse," *id.*—is simply wrong.

2. In light of the foregoing, even if the Complaint here were not sufficient to raise the disclosure claims, the Ninth Circuit still would have been correct in reaching the merits of those claims. For it is well-settled that courts can "treat the pleading as though it were amended to conform to the facts set forth in the affidavits" in opposition to a summary judgment motion and, indeed, that "it is often . . . desirable" to do just that. 6 J. Moore, *Moore's Federal Practice*, ¶ 56.10 & cases cited therein.

In this case—in which the disclosure issues had been termed the heart of the case by Schumer's counsel almost a year before Hughes moved for summary judgment and in which those issues were briefed by Hughes on the motion for summary judgment—the court of appeals was surely correct in treating this as a case in which a proper exercise of that discretion called for treating the pleadings as amended by the opposition to summary judgment.[32]

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[31] The Ninth Circuit's contrary view appears to have stemmed from its lumping together of the Disclosure Statement issue with an analytically distinct issue—the CAS 401 issue, *see supra* at n.7. Schumer concededly *did* raise the CAS 401 issue for the first time in opposition to summary judgment. But the procedural defect with respect to the CAS 401 claim—if it was one—is of no moment here inasmuch as the Ninth Circuit reached the merits of the CAS 401 claim and decided it in *Hughes'* favor. Pet. App. 25a. In the district court, Hughes implicitly recognized that the CAS 401 issue was the only new issue when, in its Reply Brief in support of its summary judgment motion, Hughes attacked only the addition of the CAS 401 claim and not the Disclosure Statement claim. *See supra* at n.7.

[32] Hughes would read the decision below as standing for the sweeping proposition that district courts are required *in every case* to consider a plaintiff's papers in opposition to summary judgment as *de facto* amended complaints. *See* Pet. Br. at 44-45. In context, however—and as shown by the Ninth Circuit cases cited in that decision, Pet. App. 22a-23a—the court of appeals' determination that it was proper to reach the merits here was based upon the facts and circumstances of *this* case.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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